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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
in his personal and official capacity
as Chief Justice of The Supreme Court of Virginia,
Appellants,

v.

CONSUMERS UNION OF THE
UNITED STATES, INC., *et al.,*
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF AMICUS CURIAE OF THE STATE OF SOUTH CAROLINA JOINED BY THE ATTORNEYS GENERAL OF ARIZONA, DELAWARE, FLORIDA, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN AND WYOMING

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INTEREST OF THE AMICUS CURIAE

On May 8, 1979, a three-judge district court for the Eastern District of Virginia entered an order and memorandum opinion awarding declaratory and injunctive relief and

attorneys' fees against the Supreme Court of Virginia and its Chief Justice. The Court held that the doctrine of judicial immunity did not protect the defendants from the award of such relief.

The interest of the amicus, joined by the attorneys general of the above twenty-one states, is that the opinion of the Court will effect fundamental alteration in the relations between the state and federal courts. The amicus seeks a clear statement from this Court to guide the lower federal courts in entertaining suits against judges arising from the judicial function and a clear prohibition against monetary awards against state judges or the courts on which they sit, most especially in those instances in which the defendant judges and courts act in good faith of execution of their duties.

JURISDICTION

Jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

ISSUES PRESENTED

1. May judges be sued for actions taken within or in excess of their judicial jurisdiction?

2. If attorneys' fees may be awarded against a state court or its judges, may such an award be made in the absence of an express finding that the actions complained of were taken in bad faith?

STATEMENT OF THE CASE

The *amicus curiae* adopts the Statement of the Case in the Jurisdictional Statement.

SUMMARY OF ARGUMENT

Congress could not have intended to abolish judicial immunity under 42 U.S.C. § 1988 since suits against judges

(and *a fortiori* the Courts on which they sit) for their discretionary judicial actions are not suits which may be brought to enforce the provisions of the Civil Rights Acts. If, however, such suits may be brought, substantial policy interests dictate that an express finding of bad faith be made before an award of attorneys' fees may be made against a court or its judges.

ARGUMENT

I.
THE DOCTRINE OF JUDICIAL IMMUNITY PROHIBITS ALL SUITS AGAINST JUDGES FOR ACTIONS TAKEN WITHIN OR IN EXCESS OF THEIR JUDICIAL JURISDICTION.

Most recently in *Stump* v. *Sparkman,* 435 U.S. 349 (1978) and in *Pierson* v. *Ray,* 386 U.S. 547 (1967), this Court recognized that the common-law defense of judicial immunity applies with equal force to actions brought under the Civil Rights Acts. Both of these cases, and the earlier cases of *Randall* v. *Brigham,* 74 U.S. (7 Wall.) 523 (1869) and *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335 (1871) upon which this Court relied, applied the rule that judicial immunity protects judges against "civil actions" in the context of suits for damages. As a result, the question has been raised whether the doctrine protects judges against being required to defend in suits seeking equitable relief from actions taken by them in their judicial capacity. An examination of the doctrine compels the conclusion that such suits cannot be maintained.[1]

[1] The Court below correctly determined that the doctrine of judicial immunity was applicable to the acts of the defendants, it merely misconstrued the scope of the doctrine. While the enactment of rules governing the conduct of the bar may also be described as "legislative," as the dissent below argued, it is judicial in the sense that it is the exercise of exclusive judicial power to set rules for admission or disbarment.

At common law, judges cannot be sued for acts done or words spoken in their judicial capacity. *Floyd and Barker,* 12 Co. Rep. 23, 77 Eng. Rpt. 1305 (1607); *Yates* v. *Lansing,* 5 Johns. 282 (N.Y. Sup. Court of Judicature 1810); *Taaffe* v. *Downs,* (1813) reported in *Calder* v. *Halket,* 3 Noo. 38, 13 Eng. Rep. 12. (1839). This immunity was designed to protect judges from continuous litigation regarding decisions reached in a judicial capacity and was based on the theory that a judge was answerable only to his Sovereign for his judicial acts and not to any other judge. Therefore, a judge could not be questioned about his judicial acts by another judge, either at law (for damages) or in equity (for an injunction). *Heath* v. *Rydley,* Cro.Jac. 335, 79 Eng. Rep. 286 (1614). In either case, the proper remedy was by way of a writ of error from a superior court. As Maitland pointed out:

> Understand well that the Court of Chancery never asserted that it was superior to the Court of Law; it never presumed to send to them such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must not do that or quashing their proceedings—the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judge, but to the party.

Maitland, EQUITY: A COURSE OF LECTURES, at 9 (1936).

In this country, the common-law doctrine of judicial immunity was first enunciated by Mr. Chief Justice Kent for the New York Supreme Court in the case of *Yates* v. *Lansing, supra.* This court, citing *Yates,* adopted and elaborated on the doctrine in *Randall* and *Bradley.* Each of these cases, and the subsequent cases which have reaffirmed the immunity, refers to the immunity as one from all "civil actions." In addition to the English common-law precedents holding

that judges were immune from suits in equity, *Heath* v. *Rydley, supra,* it is instructive to note that Mr. Justice Miller, a member of the majority of this Court in both *Randall* and *Bradley,* speaking on Circuit near the time of those decisions, stated:

> The phrase 'civil actions' includes actions at law, *suits in chancery,* proceedings in admiralty, and all other judicial controversies where rights of property are involved, whether between private parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime.

United States v. *Ten Thousand Cigars,* 1 Woolw. 123, 28 Fed. Cas. 39 (1867). (emphasis added) *Accord, Green* v. *United States,* 76 U.S. (9 Wall.) 655 (1869); *Rison* v. *Cribbs,* 1 Dill. 181, 20 Fed. Cas. 833 (1870). This Court, then, apparently intended itself to be understood to bar equitable as well as legal actions against judges when they act in their judicial capacity.

That equitable suits as well as suits for damages cannot be brought against a judge is clear when one of the principal purposes of the doctrine is recognized. While relieving members of a court of the dangers of vexatious and harrassing litigation and removing the fear of monetary liability for the actions which they undertake in a judicial capacity are compelling reasons for imposing the doctrine, and reasons often cited in the cases on the subject, a primary, and perhaps overriding purpose is to protect the jurisdiction of the courts and the finality of judgments.

If the law permits a judge to be enjoined from taking actions which lie in his powers as a judge he may be enjoined from applying the law in a particular fashion in a case before him, *See, e.g. Wilkins* v. *Rogers,* 581 F.2d 399 (4th Cir. 1978), or from enforcing his orders in a particular case. It is

the act of judgment as much as the judge which the doctrine is designed to protect.

One of the earliest reported cases noted this concern:

> . . . for if the judicial matters of record should be drawn in question, by partial and sinister supposals and averments of offenders, or any on their behalf, there never will be an end of causes: but controversies will be infinite. . .

Floyd and Barker (1608), *supra.* Likewise, Chief Justice Kent stated in the first American case on judicial immunity:

> Judicial exercise of power is imposed upon the courts. They must decide and act according to their judgment, and therefore the law will protect them. The chancellor, in the case of the plaintiff, was bound in duty to imprison and reimprison him, if he considered his conduct, as amounting to a contempt of his court. The obligations of his office left him no volition. He was as much bound to punish a contempt commited in his court, as he was bound in any other case to exercise his power. He may possibly have erred in judgment, in calling an act a contempt which did not amount to one, and in regarding a discharge as null, when it was binding. This court may have erred in the same way; still his was but error of judgment, for which neither the chancellor, nor the judges of this court, are or can be responsible in a civil suit. Such responsibility would be an anomaly in jurisprudence. No statute could have intended such atrocious oppression and injustice. . .

Yates v. *Lansing,* 5 Johns. at 297, 398 (1810). Appellate courts exist to correct the errors of judges. To permit injunctive relief against the judicial acts of a judge would provide a means of collaterally attacking judgments irreparably damage the orderly administration of justice.

A rule which would permit injunctions but not damages

to be awarded against judges would undercut the underlying reasons for the immunity and produce the incongruous result that all judges could be harrassed and intimidated but that judges who acted with malice or corruption would be protected against payment of damages. A rule whose sole effect is to protect the purses of the guilty is pointless. As this Court has previously stated:

> [judicial immunity] *is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their independence, and without fear of consequences.*

Bradley, supra, at 350 (citations omitted) (emphasis in original).

An additional consideration is presented where the injunctive relief is sought in a Federal court against a State judge. The doctrine of judicial immunity so far discussed applies equally to State and federal judges. *See, e.g., Smallwood* v. *United States,* 358 F.Supp. 398 (E.D. Mo. 1973), *aff'd.* 486 F.2d 1407 (8th Cir. 1973). If the common law does not protect a judge from suits for injunctions one Federal judge may, of course, enjoin another. In the context of federalism, the friction between State and federal courts, a constant source of concern in the past, would be exacerbated by permitting such suits to be entertained. The incidence of suits against State judges in federal court alleging denial of due process of law in the manner or substance of the State court's rulings or alleging the unconstitutionality of the law applied and seeking injunctive relief against the judge will increase and presumably the defendant State judge will be required to appear in federal district court to explain his rulings or judicial conduct, thus placing the District Courts in a quasi-appellate role over the State courts. A funda-

mental change in the roles of the State and federal courts would be effected.

Congress cannot have intended such a far-reaching result nor can such an intention be lightly presumed from the general language of the Civil Rights Acts.

Since the Civil Rights Acts, under which this case was brought were not designed to permit the District Courts to entertain civil actions against State judges or the Courts upon which they sit for the exercise of their judicial power, such a suit is not "an action or proceeding to enforce the provisions" of the Civil Rights Acts and the award of attorneys' fees for such a suit is not within the contemplation of 42 U.S.C. § 1988.

II.
IN LIGHT OF THE HIGHLY SENSITIVE CONSTITUTIONAL ISSUES INVOLVED IN THE RELATIONS BETWEEN THE STATE AND FEDERAL COURTS, AWARDS OF ATTORNEYS' FEES AGAINST A STATE COURT, IF AUTHORIZED, SHOULD ONLY BE AWARDED UPON AN EXPRESS SHOWING OF BAD FAITH.

This Court and the lower Federal Courts have in the past limited the award of attorneys' fees to instances in which it is found that the case of the party against whom the fee was awarded was frivolous, unreasonable, or without foundation, *Christianburg Garment* v. *EEOC,* 434 U.S. 412 (1978), in order to protect substantial policy interests. The purpose of permitting an award of attorneys' fees is to effectuate the policies of the substantive provisions of the law to which it applies. As has been demonstrated, the substantive provisions of the Civil Rights Acts were not and could not have been intended to permit suits against the State courts. Congress did not enact the Civil Rights Acts to permit suits to harrass and intimidate the State judiciary. *Pierson* v. *Ray,* 386 U.S.

547 (1967). The State courts, as this Court has repeatedly noted, are also vested with the responsibility of protecting Federal rights and when they act in a judicial capacity, either by deciding cases or fashioning rules governing the membership in the bar, it cannot be assumed that they did so without regard to the Constitutional implications of their decisions. Opinions regarding the Constitutionality of any particular action may differ radically. Prior to the decision of this Court in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), the majority of the States prohibited advertising by attorneys. It must be assumed that those Courts which had enacted the rule did so in the honest belief that the Constitution did not prohibit such a rule. The State courts were incorrect in this decision as they might on occasion be in other decisions made by them. The existence of appellate courts assumes that such errors will be made. However, the fact that the State courts, like the federal courts, provide a device for the resolution of controversies and a mechanism by appeal to this Court by which such errors may be cured, militates against the argument that resort to the District Courts and awards of attorneys' fees are necessary in order to vindicate the policies embodied in the Civil Rights Acts. It is, after all, judges who must decide Constitutional questions and the errors of decisions made in good faith should not form the basis for the award of attorneys' fees. Congress cannot have intended that those charged with protecting the Constitution arrive at the correct decision at their peril. The Federal District Courts and Courts of Appeal, charged with the protection of the Constitution have arrived at erroneous conclusions of law. Indeed, this Court has on occasion reconsidered previous decisions and arrived at a different conclusion. Decisions by the members of the State courts concerning the Constitutional issues with which they are daily presented could not have been intended by Congress to be corrected in the Fed-

eral District Courts and attorneys' fees awarded for correction of good faith errors.

The policy of encouraging fearless decision-making by the State courts which underlies judicial and legislative immunities can only be hindered by permitting routine awards of attorneys' fees when those decisions prove to be incorrect.

CONCLUSION

The judgment of the District Court should be reversed insofar as it applies to the Supreme Court of Virginia and the Chief Justice. The award of attorneys' fees against the Supreme Court of Virginia and the Chief Justice should be reversed.

Respectfully submitted,

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